

Lau (Migration) [2018] AATA 1897 (6 April 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Kwok Lun Lau
CASE NUMBER:	1619818
DIBP REFERENCE(S):	BCC2015/3140353
MEMBER:	K. Chapman
DATE:	6 April 2018
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(2) of Schedule 2 to the Regulations; and • cl.820.221(1) of Schedule 2 to the Regulations.

Statement made on 06 April 2018 at 11:16am

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 – The applicant lost their right to hearing – An unlawful non-citizen at the time of application – Compelling reasons to waive Schedule 3 criteria – Sufficient evidence of genuine and continuing relationship – Decision under review remitted

LEGISLATION

Migration Act 1958, s 5F, 65, 359, 360, 363A

Migration Regulations 1994, r 1.15A, Schedule 2, cls 820.211, 801.221, Schedule 3, Public Interest Criterion 3001,3003,3004

CASES

Jayasinghe v MIMA [2006] FCA 1700

Hasran v MIAC [2010] FCAFC 40

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 8 November 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* ('the Act').
2. The applicant, Mr Kwok Lun Lau, applied for the visa on 23 October 2015 on the basis of the relationship with his sponsor, Ms Mandy Ly. The applicant is a British National (Overseas) who was born in Hong Kong. The sponsor is an Australian citizen by birth. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 ('the Regulations'). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.820.211(2)(a) and cl.820.211(2)(d)(ii). Whilst satisfied the applicant was married to the sponsor at the time of the visa application, the delegate was not satisfied that they were in a genuine and continuing spousal relationship. Further, the delegate determined that the applicant did not hold a substantive visa at the time of application, there were not compelling reasons for granting the visa, and accordingly he did not satisfy Public Interest Criterion 3004 ('PIC 3004').
4. On 23 November 2016, the applicant applied to the Tribunal for review of the visa refusal decision, providing a copy of that decision with his application. On 10 January 2018, the Tribunal wrote to the applicant, through his registered migration agent, pursuant to subsection 359(2) of the Act inviting him to provide further information concerning whether there are compelling reasons with respect to PIC 3004, why he ceased to hold a substantive visa after 22 October 2015, and to support his claims of having been in a spousal relationship with the sponsor. The applicant was invited to provide his response not later than 24 January 2018, but failed to do so.
5. On 8 February 2018, the Tribunal received a request for an extension of time to respond to the s.359(2) invitation from a registered migration agent who is a colleague of the registered migration agent on the record. The request for the extension contended that the agent on the record was overseas and the firm 'overlooked the response date in the request for further information.' The failure to respond in time to the invitation reflects poorly upon the applicant's representative. On 8 February 2018, the Tribunal Registry advised the agent on the record that by operation of law an extension of time could not be granted in this matter and that the applicant had lost their right to hearing.
6. Where an applicant is invited to provide further information in accordance with subsection 359(2) of the Act, and fails to do so within the prescribed period, the Tribunal may make a decision on the review without taking any further action to obtain the information according to subsection 359C(1) of the Act. In these circumstances, the applicant is not entitled to appear before the Tribunal in accordance with subsection 360(3) of the Act. Of note, the effect of section 363A of the Act is that if an applicant has no entitlement to a hearing, the Tribunal has no power to permit the applicant to appear before it as outlined in the Full Federal Court authority in the matter of *Hasran v MIAC* [2010] FCAFC 40. Accordingly, the applicant lost his right to participate in a hearing by the failure of his representative to respond in time to the invitation of 10 January 2018.

7. However, from 9 to 16 February 2018 an extensive array of documents were submitted to the Tribunal in support of the applicant's claims to have compelling circumstances and that he has been in a genuine spousal relationship with the sponsor since prior to the time of application. Written submissions were also received summarising these claims. The Tribunal has duly considered the aforementioned material. The Tribunal observes this to be a matter where the applicant provided scant documentary evidence with his visa application to the Department of Immigration, then provided more extensive evidence in conjunction with the review that was unavailable to the primary decision maker.
8. Given that the applicant lost his right to participate in a hearing, the Tribunal has very carefully considered the documentary evidence before it. Following extensive assessment, the Tribunal does not consider a hearing to be necessary in this matter, as it is able to find in favour of the visa applicant on the basis of the material before it, pursuant to s.360(2)(a) of the Act. Accordingly, for the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

ISSUES AND LAW

9. There is a two stage process for onshore Partner visas. An applicant must first hold a provisional visa, enabling them to remain in Australia on a temporary basis, prior to the grant of a permanent visa. The grant of a permanent visa would generally depend on whether the relationship has continued for a period of at least two years.
10. Pursuant to cl.820.211(2)(d), an applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004, unless the Minister is satisfied that there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.
11. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2). Criterion 3003 of Schedule 3 applies in a limited number of cases where the applicant has not been the holder of a substantive visa on or after 1 September 1994, and on 31 August 1994 was either an illegal entrant or the holder of an entry permit that was not valid beyond that date.
12. Criterion 3004 of Schedule 3 requires that the Minister be satisfied that the applicant is not the holder of a substantive visa because of factors beyond his or her control, and that there are compelling reasons for granting the visa, and that the applicant has complied substantially with the conditions applicable to the last of any entry permits and subsequent bridging visa or the last of any substantive visa and bridging visa held by the applicant. In addition, the Minister must be satisfied that the applicant would have been able to satisfy the criteria or be granted the visa on the day he or she last held a substantive or criminal justice visa or last entered Australia unlawfully; that the applicant intends to comply with any conditions of the visa; and the last visa or entry permit held (if any) was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or further entry permit, while the holder remained in Australia.
13. Further, clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor, who is an Australian citizen.
14. The issues in the present case therefore include whether the Schedule 3 criteria are satisfied, and if they are not satisfied, whether there are compelling reasons for not applying those criteria. Further, if the applicant satisfies cl.820.211(2)(d), other issues for

consideration are whether he was at the time of the visa application, and remains at the time of the making of this decision, the spouse of the sponsor.

CONSIDERATION OF CLAIMS AND EVIDENCE

15. The Tribunal has had regard to all of the documentary evidence before it. The Tribunal notes that material including, but not limited to, correspondence dated 9 October 2014 notifying the grant of a Prospective Marriage Subclass 300 visa to the applicant, identity documents, personal statements, visa application form, sponsorship form, Certificate of Marriage, third party Statutory Declarations, handwritten notes (double sided), health insurance documentation, vehicle registration, financial documents, and a handwritten letter dated 20 September 2016, was submitted by the applicant to the Department.
16. The Tribunal notes that material including, but not limited to, the application for review, Departmental delegate's visa refusal decision, correspondence from the representatives, various emails, Departmental correspondence, celebratory cards, invitations, leisure accommodation and travel documents, Statutory Declaration of the applicant dated 22 November 2016, various consumer item receipts and statements (such as regarding car insurance, toll way invoices, health insurance, leisure activities), documentation regarding marriage ceremonies and confirmation of marriage in Australia and overseas, Statutory Declaration of the sponsor dated 17 November 2016, financial records, third party Statutory Declarations and statements, telephone records (such as invoices and logs), documentation pertaining to vehicles, photographs, tenancy documentation, taxation records, utility accounts, submissions dated 9 February 2018, the Statutory Declaration of the sponsor dated 16 February 2018, and the Statutory Declaration of the applicant dated 16 February 2018, was submitted to it by the applicant.

Does the applicant meet the Schedule 3 criteria, or should those criteria be waived?

17. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
18. The applicant's last substantive visa was a Tourist Subclass 601 visa which expired on 22 October 2015. The applicant lodged his application for the Partner visa on 23 October 2015 as indicated by the Departmental receipt stamp. The application was not formally processed until 27 October 2015 because the applicant was an unlawful non-citizen at the time of application. He was granted a Bridging Visa C on 27 October 2015. The applicant was an unlawful non-citizen for a period of five days.
19. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, an issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

Criterion 3001

20. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision. In the present matter, the relevant day is the last day the applicant held a substantive visa, which is 22 October 2015. As the visa application was made within 28 days of the relevant day, the applicant satisfies criterion 3001.

Criterion 3003

21. Criterion 3003 only applies to applicants who have not, on or after 1 September 1994, been the holder of a substantive visa, and on 31 August 1994 was either an illegal entrant or the holder of an entry permit that was not valid beyond that date. The Tribunal is satisfied that the applicant was not such a person, and accordingly criterion 3003 does not apply.

Criterion 3004

22. Criterion 3004 of Schedule 3 requires that the Minister be satisfied that the applicant is not the holder of a substantive visa because of factors beyond his or her control, that there are compelling reasons for granting the visa, and that the applicant has complied substantially with the conditions applicable to the last of any substantive visas and any subsequent bridging visa held by the applicant. In addition, the Minister must be satisfied that the applicant would have been able to be granted the visa if the applicant had applied on the day he or she last held a substantive or criminal justice visa; or would have satisfied the criteria when he or she last entered Australia unlawfully; that the applicant intends to comply with any conditions of the visa; and the last visa or entry permit held (if any) was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or further entry permit, while the holder remained in Australia.
23. In the present case, criterion 3004 applies as the applicant did not hold a substantive visa at the time of application for the onshore Partner visa. He last entered Australia on 22 July 2015 as the holder of a Tourist Subclass 601 visa which expired on 22 October 2015. The Tribunal notes that the applicant previously held a Prospective Marriage Subclass 300 visa, sponsored by his now wife, which was granted on 9 October 2014 and expired on 9 July 2015. Whilst the applicant married the sponsor in Brisbane on 27 June 2015, he did not apply for the Partner visa prior to the expiration of his Prospective Marriage visa and he then went offshore on 29 June 2015. Written submissions indicate that the applicant and sponsor had a ceremonial wedding in Hong Kong on 5 July 2015 for the benefit of the applicant's offshore family members.
24. The applicant and sponsor contend in their respective Statutory Declarations that they were advised by a Departmental officer on 23 July 2015 that the onshore Partner visa application could be lodged upon the expiry of the applicant's Tourist visa. A copy of an email from a Departmental officer to the applicant dated 10 December 2015, which was submitted to the Tribunal, confirms he was advised that if he lodged an onshore Partner visa after the expiration of his Tourist visa then the application fee would reduce from \$6,865 to \$1,450. This is a most curious circumstance in the view of the Tribunal.
25. The applicant contends that he no longer held a substantive visa at the time of the onshore Partner visa application due to factors beyond his control, by acting upon the advice of the Departmental officer. The Tribunal notes that correspondence to him from the Department dated 9 October 2014 indicates when granted the Prospective Marriage visa the applicant was advised he must apply for the onshore Partner visa before 9 July 2015. The applicant did not do so and chose to depart Australia for his ceremonial wedding in Hong Kong. Clearly, had the applicant followed the usual process of marrying his fiancé, then applying for the onshore Partner visa within the validity of the Prospective Marriage visa, he would not have found himself in the predicament of being an unlawful non-citizen. However, following careful consideration of the evidence, the Tribunal accepts that the applicant followed the advice of the Departmental officer to lodge the onshore Partner visa following the expiry of his Tourist visa, in order to benefit from a reduced visa application fee, and that by doing so he no longer held a substantive visa at that time due to factors beyond his control.

26. As will be outlined in further detail below, the Tribunal is satisfied that the documentary evidence indicates the applicant and the sponsor have known each other since 2007, commenced dating in 2010 and were in a committed relationship with each other from October 2013. Having regard to the circumstances of this particular case, which include the applicant acting upon Departmental advice as previously described and also the duration of the relationship, the Tribunal finds that there are compelling reasons for granting the visa. The Tribunal also finds that the applicant has complied substantially with the conditions that applied to his last substantive visa and Bridging Visas, and also to his current Bridging Visa, given there is no evidence before it to the contrary.
27. For reasons which will become apparent, the Tribunal is satisfied that the applicant would have satisfied the Partner (Temporary) (Class UK) criteria on the day he last held a substantive visa which was 22 October 2015. Further, the Tribunal is satisfied that the applicant intends to comply with any visa conditions attached to the onshore Partner visa once granted, as there is no evidence to the contrary before it. Additionally, the Tribunal notes that the last substantive visa, and the current Bridging Visa, held by the applicant are not subject to a no further stay condition. Accordingly, the applicant satisfies criterion 3004.

Whether the parties are in a spouse or de facto relationship

28. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor, who is an Australian citizen.
29. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

30. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The applicant enclosed with his visa application a marriage certificate indicating he married the sponsor on 27 June 2015 at Brisbane in Queensland. On the evidence before the Tribunal, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

31. In assessing whether the applicant and sponsor have been in a spousal relationship, the Tribunal has considered the documentary evidence submitted with the primary application and the additional documentary evidence that was provided to the Tribunal. Having regard to the principles outlined in the decision of *Jayasinghe v MIMA* [2006] FCA 1700, when considering the circumstances of the relationship at the time of the visa application, the Tribunal has had regard to later events as they tend logically to show the existence of prior facts. As previously noted, the applicant provided only scant documentary evidence to the

Department with his visa application, however at the time of this decision more comprehensive documentary evidence was before the Tribunal.

32.

33. *Financial aspects of the relationship*

34. The Departmental file contains limited documentary evidence concerning the financial aspects of the relationship at the time of application. However, the documentary evidence before the Tribunal indicates that at that time the applicant and the sponsor had shared expenses together. Travel documentation is suggestive of the couple having conducted holidays together prior to the time of application. Such documentation is suggestive of the couple sharing expenses with respect to these holidays. Correspondence dated 18 September 2014 from the Queensland Registry of Births, Deaths and Marriages demonstrates a fee of \$385 was paid on that day to lodge a Notice of Intended Marriage. Receipts for social activities are also suggestive of the couple having shared daily expenses. The Tribunal notes also that at the time of application, the couple had conducted two wedding ceremonies (one in Australia and one in Hong Kong) and had supplied evidence sufficient for the applicant to be granted a Prospective Marriage visa in October 2014. The Tribunal is satisfied that the couple shared expenses with regard to their wedding arrangements in both locations.
35. Following the time of application an extensive array of documentary evidence points to the applicant and sponsor having entwined their finances in a meaningful fashion. Joint bank account statements display transactions commensurate with the daily expenses of a spousal couple. Documents with respect to the registration and maintenance of vehicles, health insurance, residential arrangements, utilities, leisure activities and consumer purchases indicate the couple jointly own significant assets (by way of vehicles), have joint liabilities, significantly pool financial resources and share day to day household expenses from joint funds. After careful consideration of the circumstances holistically, the Tribunal affords medium weight to the evidence in support of the financial aspects of the relationship.

36. *Nature of the household*

37. The documentary evidence contained in the Departmental file is limited with respect to the nature of the household at the time of application. However, statements from the applicant and sponsor, which are supported by statements from third parties, are suggestive of the couple having resided together for periods with their respective families in Australia and Hong Kong prior to the time of application. The sister of the applicant, Ms Cindy Kwong, in her Statutory Declaration of 29 July 2015 advises that the couple regularly visited each other and their families in both countries. She notes that the applicant moved to Australia in June 2015. A Statutory Declaration from Ms Joy Constantino dated 23 November 2016 advises that she met the applicant during 2013 in Hong Kong whilst on holiday with the sponsor, who stayed with the applicant at his residence then. Ms Constantino states that following the applicant moving to Australia she has been in regular contact with the couple. The personal statements of the applicant and sponsor point to them having stayed together with each other at their respective family residences in Australia and Hong Kong, then the applicant moving in permanently with the sponsor and her family once he moved to Australia. Photographs of the couple support these contentions.
38. Following the time of application an extensive array of documentary evidence points to the applicant and sponsor having shared living arrangements. The variety of financial documentation referred to above contains common addresses for the couple at both the family residence of the sponsor and in an apartment they have more recently rented. Recent documents such as a residential tenancy agreement, utility account and Queensland

Transport change of address correspondence, indicates the couple presently reside together. Statutory Declarations from third parties also support the contention that the applicant and the sponsor have resided together for some time. Having carefully considered all of the evidence, the Tribunal affords medium weight to the evidence in support of the nature of the household.

39.

40. *Social Aspects of the Relationship*

41. The Tribunal has received more extensive documentary evidence regarding the social aspects of the relationship at the time of application than was available to the Departmental delegate. In particular, photographic evidence illustrates that the couple have been known to each other since at least 2008, have been in the presence of multiple third parties in both Australia and Hong Kong, and have held wedding ceremonies with their respective families in both countries during 2015. Documents pertaining to travel also corroborate that the couple have undertaken social activities in both Australia and Hong Kong. It is apparent to the Tribunal from the photographic evidence that the couple were well known to the wider world as being in a spousal relationship at the time of application. The Statutory Declaration of Ms Constantino dated 23 November 2016 indicates that an important milestone in the couple's relationship occurred when they were part of the bridal party at the wedding of the sponsor's sister in Sydney during October 2013.

42. The photographic evidence also demonstrates that following the time of application the couple have engaged in numerous social activities in the presence of family and friends. It is apparent from the photographs that the couple travelled to Sydney in 2016 to visit the sister of the sponsor, her partner and their newborn child. Further, photographs depict the same individuals together in Brisbane later that year. A variety of third party statements point to the applicant and sponsor being in a genuine spousal relationship. Receipts for leisure activities are also suggestive of the couple engaging in social activities together. After careful consideration, the Tribunal places medium weight upon the evidence in support of the social aspects of the relationship.

43. *Nature of the persons' commitment to each other*

44. The personal statements of the applicant and sponsor indicate they have known each other since 2007, started dating in 2010, and were in a committed relationship with each other from October 2013. Having regard to the documentary evidence referred to above, the Tribunal is satisfied that since October 2013, when the couple attended the wedding of the sponsor's sister as part of the bridal party, they committed to each other on a long term basis. The evidence indicates the couple have resided with each other at their family homes in both Australia and Hong Kong since at least 2013, and that they have lived together continuously in Australia since mid-2015. The personal statements of the couple, and those of third parties, are suggestive of the applicant and sponsor drawing a significant degree of companionship and emotional support from each other, and that they view the relationship as long term. After careful consideration, the Tribunal affords medium weight to the evidence in support of the nature of the persons' commitment to each other.

45. **CONCLUSION**

46. Having regard to the matters above, the Tribunal is satisfied that Mr Lau and Ms Ly are validly married, have had, and continue to have, a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship between them has been and remains genuine and continuing. The Tribunal is also satisfied that they have lived together since their marriage. The Tribunal is therefore satisfied that the requirements of

s.5F(2)(a)-(d) of the Act were met at the time of the visa application and continue to be met at the time of this decision.

47. Given these findings, the Tribunal is satisfied that at the time the visa application was made, and at the time of this decision, Mr Lau and Ms Ly were in a spousal relationship as defined in the Act. The Tribunal is also satisfied that Ms Ly was aged over 18 years when she sponsored Mr Lau, and further that she is not prohibited from being a sponsoring partner. Therefore the Tribunal finds that Mr Lau meets the requirements of clauses 820.211(2) and 820.221(1).
48. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

49. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211(2) of Schedule 2 to the Regulations; and
 - cl.820.221(1) of Schedule 2 to the Regulations.

K. Chapman
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or

- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.